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APR 28 1970

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1498

THE TUNICA COUNTY SCHOOL DISTRICT, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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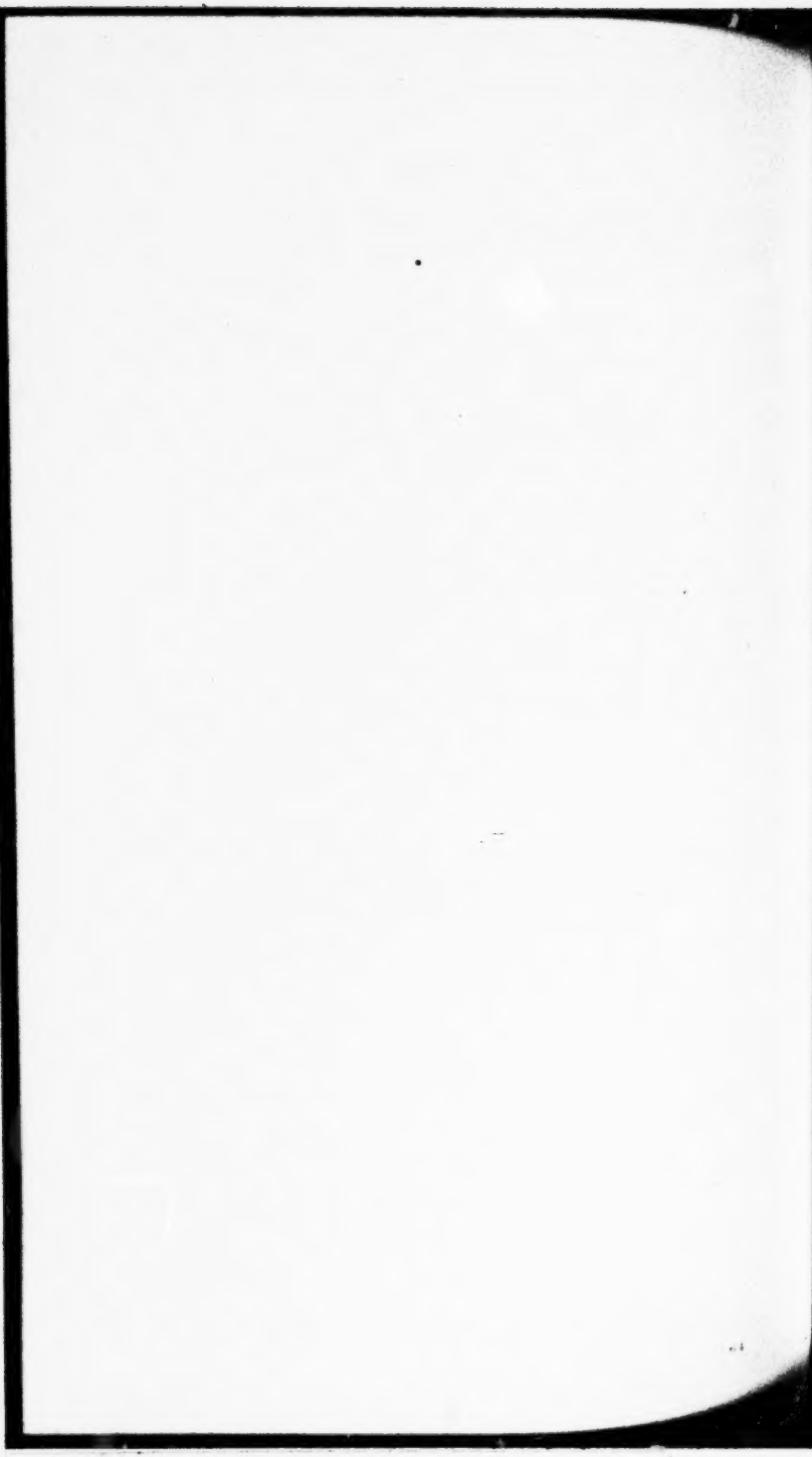

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Tunica County School District, a school district organized under the Laws of Mississippi, the Superintendent of Education and Members of the Board of Education of Tunica County, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 6, 1970, and denial of petition for rehearing on February 9, 1970.

ORDERS AND OPINIONS DELIVERED IN COURTS BELOW

Since all of the orders and opinions of the District Court for the Northern District of Mississippi and the Court of Appeals for the Fifth Circuit pertinent to this appeal are not reported, the same are included in the appendix to this petition as follows:

1. Order of District Court dated January 19, 1968. (Appendix, page A1).

2. Order of District Court dated May 14, 1969. (Appendix, page A16).

3. Order of the District Court dated July 22, 1969. (Appendix, page A18).

4. Order of the District Court dated September 12, 1969. (Appendix, page A25).

5. Judgment of Court of Appeals dated January 6, 1970. (Appendix, page A27).

6. Order of District Court dated January 7, 1970. (Appendix, page A28).

7. Opinion of the Court of Appeals rendered January 6, 1970. (Appendix, page A30).

8. Order of Court of Appeals entered February 9, 1970, denying petitioners' petition for rehearing and petition for rehearing en banc, with dissenting opinion. (Appendix, page A33).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) for review of judgment of the United States Court of Appeals for the Fifth Circuit entered January 6, 1970 and petition for rehearing denied by that Court on February 9, 1970.

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QUESTIONS PRESENTED FOR REVIEW

The lower Court found that this was an unusual school desegregation case presenting "the greatest degree of complexity" of all Mississippi School Districts. It presents questions to this Court not previously decided:

(a) Questions Relative to Freedom of Choice

1. Does the United States Constitution require a school district to abandon freedom of choice that had resulted in ever-increasing desegregation and replace it with a zoning plan that results in no desegregation at all, and if so, whose constitutional rights have been vindicated?

2. Should the Tunica County School District with a ratio of seven black students to each white student be equated with districts with a ratio of one to one or less in determining whether freedom of choice is to be permitted?

3. In determining whether freedom of choice should be permitted in the Tunica County School District, should the Court give any consideration to the fact that the number of black voters exceeds the number of whites registered to vote?

4. Is it of consequence in determining whether freedom of choice should be permitted that the Justice Department sought to deprive the parents of the Tunica County School District of this right without any complaint from any citizen in the County, black or white?

5. In determining whether freedom of choice is the most practical method of desegregating the schools of Tunica County, Mississippi, was the Court of Appeals justified in failing to consider the unequivocal finding of the District Court that zoning or pairing "would result in all Negro student enrollment."

6. How long must a school district continue with a zoning plan with an all black enrollment before freedom of choice and some integration is restored?

(b) Questions Involving Due Process

7. Was the Board of Education of Tunica County and the children they represent denied due process in their appeal to the Court of Appeals for the Fifth Circuit in that

a. The Court of Appeals directed the School District to file its brief in that Court not later than January 15, 1970, and then decided the case on January 6, 1970 before this brief was filed.

b. The Court of Appeals on January 6, 1970 ordered the immediate remand of this case, that the mandate issue forthwith, and that "no stay will be granted pending petition for rehearing. . . ." This order was made before the Court of Appeals had the benefit of a brief from the School District. Thereafter a brief was filed, and while the Court denied rehearing, it found merit in the position of the School District as set forth in its brief, for the Court directed that "the matters asserted in the brief of the School District are appropriate for consideration by the District Court on remand." The Court of Appeals thus overlooked the fact that it had already remanded this case and commanded immediate execution by the District Court. This irregular procedure was highly prejudicial to the petitioners as will be shown.

STATEMENT OF CASE

Tunica County, Mississippi is a Delta county situated in the Northwest part of the State. Its population according to the 1960 decennial census was 16,820 of which 13,315 were Negro and 3,505 were white. Tunica County School District embraces all of Tunica County.

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This suit was commenced by the Justice Department in the summer of the year 1967. The relief sought at that time was a decree giving all parents the freedom to choose a school for their child to attend. Before the action was brought, the Board of Education had already inaugurated a progressive freedom of choice plan. In January, 1968, following a hearing in the District Court, a decree was entered specifying freedom of choice procedures and judicially establishing freedom of choice as the method of assigning students to schools and declaring that the school oriented transportation system employed by the District did not discriminate in any way. All of this seemed entirely satisfactory to everyone in Tunica County.

Six months after the entry of the freedom of choice decree, the Justice Department, without any request of any resident of the County and apparently without conferring with any of the citizens of the District, moved the Court to compel the children and parents of the District to give up their recently established freedom of choice and to compel the School Board to assign students on a geographic or pairing plan. There was no suggestion that the Board of Education had failed to conduct freedom of choice procedures properly or fairly or that anyone had tried to dictate the choice of Negroes or in any way intimidate them in their choice.

The Board objected to the authority of the Justice Department to file the motion without having received any complaint from anyone in the County and without having conferred with a single parent in the District. This objection was overruled and the motion of the Justice Department was heard by the Court on December 18, 1968. The School Board contended throughout that freedom of choice was the only feasible way to integrate the schools of this County, and *all* evidence showed that it was the

only way integration could be obtained under the peculiar circumstances and conditions existing in Tunica County.

The District Court, apparently believing that freedom of choice was not available under any circumstances, required the School Board to come forward with another plan. The Board, in obedience to this decree, offered a plan to assign students on the basis of their scores on standard achievement tests. Following two hearings in this connection, one on July 3, 1969, and another on July 17, 1969, the Court entered an order directing students to be assigned on the basis of their scores on achievement tests, the plan to be installed completely over a period of three years beginning with the first four grades during the 1969-70 school year. The Court also ordered extensive faculty desegregation and reversed the earlier ruling relating to transportation and required the School Board to abandon its school oriented transportation plan even though it had been previously declared valid.

The Board tried to implement the plan, but finding it completely unsatisfactory, asked the District Court for relief early in September, 1969. At the hearing held on September 12, 1969, the evidence established that administratively, the Tunica County School System was falling apart. The Superintendent of Education died just before school started. A long time elementary school principal quit. Vacancies existed in more than twenty per cent of the teaching positions. Parents, black and white, bitterly opposed any assignment plan other than freedom of choice, and parents were refusing to register their children and some were leaving the County. The District Court denied any relief and appeal was taken to the Court of Appeals by the School District on behalf of the children affected asking for review of all of these orders of the District Court. The Court of Appeals for the Fifth Cir-

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cuit not only refused to grant any relief but ordered the District Court to immediately by February 1, 1970 require the School Board to zone the District or pair the schools of the District and otherwise require a "unitary" system.

REASONS FOR ALLOWANCE OF WRIT

(a) Questions Relative to Freedom of Choice

The September enrollment of children in the schools of the District over the past several years has been as follows:

Year	Negro	White	Percentage Negro
1965-66	3,987	868	82%
1966-67	3,504	666	84%
1967-68	3,241	586	85%
1968-69	3,182	555	85%
1969-70	3,039	441	87%

Under the freedom of choice plan voluntarily adopted in 1965, the number of Negro children attending the formerly white school steadily increased until the 1968-69 term, when Negroes constituted fifteen per cent of the total enrollment of the former white school, and as shown by the above table, the white student body had stabilized without further loss. This stabilization of white children also showed an acceptance of gradual faculty desegregation which started that year.

No white students chose to attend the former all Negro schools under the freedom of choice plan. (*It should be noted at this point that when sixty white children were involuntarily assigned to the former Negro schools for the 1969-70 school year against the wishes of their parents, fifty-nine of them refused the assignment*

and left the school system. When all white students were involuntarily reassigned in February, 1970, all of them left the system.)

Less than six months after freedom of choice had been judicially established, the Department of Justice returned to Court and demanded that students be assigned according to geographic zones or the pairing of schools. The Justice Department offered no proof and the overwhelming and uncontradicted evidence on behalf of the School District was that freedom of choice was the only way desegregation could be accomplished in Tunica County.

The lower court made these observations, recognizing that the Tunica County School District was unique:

> "It is indeed a perplexing case in this District." (Transcript of Record, Vol. I, page 242).
>
> "I suppose that of all the Mississippi School Districts, Tunica County presents the greatest degree of complexity." (Transcript of Record, Vol. I, page 407).
>
> "I realize that Tunica County has a special problem complicated by the death of their fine Superintendent and they have more teacher problems than any other District that I am aware of." (Transcript of Record, Vol. II, page 716).

In the hearing in September, 1969, the Court required the District to continue with the assignment of students by testing and found as a fact that zoning or pairing "would result in all Negro student enrollment." (Transcript of Record, Vol. II, page 708). The Court at that time further observed that "there is no way this Court can return a school district to freedom of choice in the present state of the law."

Although the School Board had little hope that the testing method of assignment would create an integrated

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system, it sincerely tried to implement the plan ordered. Most students took the test, but when the schools opened in September, 1969, twenty per cent of the white students who had attended school the previous year, most in grades one to four where the testing procedure had been substituted for freedom of choice, did not show up, and the proof showed that as the testing plan was expanded in future years, a corresponding decrease in white enrollment would inevitably follow until all white children were gone and total segregation would be the effect of the judicial mandate. This to be compared with the integration that took place with freedom of choice which progressively increased from year to year.

The School Board found it distasteful to offer the testing plan of assignment, but did so because the District Court required something other than freedom of choice. It was, however, hoped that it would result in the loss of fewer students than some of the alternatives. In this respect, it was a failure because another 114 white students left the system as a result of the new plan, and before the appeal in this case was decided, the Court of Appeals for the Fifth Circuit on December 1, 1969 declared that such a testing program was not permissible. *Anthony v. Marshall County Board of Education*, 5th Cir., 419 F.2d 1211.

The only other method for assigning students is zoning or pairing, and since there is no residential segregation in Tunica County, and the lower court so found, it was admitted that there is no way Tunica County can be zoned or grades paired so that the ratio of blacks to whites would vary substantially in any classroom from what it is generally in the system. At the time this fact was stipulated between counsel as true in July, 1968, that ratio was 5.6 Negro students to each white child. At the time

appeal was taken in September, 1969, the ratio had changed to 7 to 1, and now that freedom of choice has been completely removed and replaced by zoning, there are no white children left in the system.

What has happened in Tunica County has not been true of many, if any, of the school districts in the south, but few, if any, of those districts have the great racial imbalance found in Tunica County, Mississippi. The truth is that they have enough white children to effectively employ a zoning or pairing method of assigning students. Tunica County does not.

It is said in some of the decisions of the Courts of Appeal that freedom of choice places the burden on the Negro as the minority race to break up the dual system. Surely this could be said of a school district that had a preponderance of white people. But freedom of choice cannot be condemned in Tunica County for that reason. Here the Negro makes up 80% of the entire population, outnumbers the white voters at the polls, and with freedom of choice constituted 87% of the student enrollment. Indeed, the District Court predicted and his prediction proved itself to be absolutely correct, when freedom of choice is denied in this situation, we knowingly deprive the Negro of all integration.

When freedom of choice was removed in this District, the black citizen was deprived of much more than school integration. The parents of most of the 441 white students remaining in the Tunica County schools in September, 1969 were farm workers, mechanics, electricians and the like. They are the backbone of the County. Any of them could find employment elsewhere and have no strong ties to Tunica County. If the school picture remains in its present state, more of them will leave, and they could improve the school situation for their children by moving to

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a place blindly selected by putting their finger on a map of the United States.

The impact on the community, black and white, resulting from the loss of these artisans is incalculable. Typical of the distressing testimony in this respect is that of the administrator of the small Tunica County Hospital. Her testimony in part:

"Q. How many nurses and laboratory technicians do you have employed?

A. I have seven RN's, registered nurses, and seven licensed practical nurses and two laboratory technicians.

Q. Making a total of 16?

A. 16, that is correct.

Q. Now, how many of these men and women have children of school age?

A. Nine.

Q. Have they come to you and expressed their anxiety and fear relative to the Tunica County school situation in the last few days?

A. Yes, they have, very much.

Q. How many of them?

A. The entire nine.

Q. Now, what are the indications of what they are going to do?

A. Of course the first thing they asked me if I could help them, and of course I cannot, but they have told me that unless the school situation is straightened out they have no ties whatsoever in Tunica and they will move.

Q. Now, can they find jobs just about anywhere they go?

A. Yes, they can.

Q. Now, is it a problem for you to find personnel like this?

A. Very much. Very much.

Q. Do you feel that the threat of them leaving is very real?

A. Very much. They are very sincere people." (Transcript of Record, Vol. II, page 704).

The guide for the District Court and the Court of Appeals in deciding this case was *Green* v. *School Board of New Kent County, Virginia*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.ed. 716 (1968). If that case is to be construed as requiring the abandonment of freedom of choice in all circumstances and that it be replaced with something less effective, there is no merit in this appeal and the Court of Appeals was correct in its decision. It is with deference to that Court that we say that *Green* was not so intended.

While the Court did disallow freedom of choice in the circumstances that existed in the *Green* case, there are meaningful factual differences between New Kent County, Virginia and Tunica County, Mississippi. Suffice to say that in New Kent County, the Negro represents 50% of the total population whereas in Tunica County, the Negro makes up 80% of the total and 87% of the school population. In the *New Kent County* case, the District Court had not unequivocally found that zoning or pairing "would result in all Negro student enrollment."

Recognizing that freedom of choice still could and should be employed in some instances, this Court said in *Green*:

> "Although the general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation, *there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a State-imposed dual system to a unitary, non-racial system, there might be no objection to allowing such a device to prove itself in operation.* On the other hand, if there

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> are *reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary non-racial school system,* then 'freedom of choice' must be held unacceptable."

We do not say that freedom of choice in Tunica County is going to immediately result in the type of integration demanded by the Justice Department. We do say, and this is based on the uncontradicted proof, the findings of the lower court, and now by actual fact, zoning in Tunica County will and has resulted in nothing but integration on paper and none in the schools.

The Supreme Court in *Green* was careful in suggesting that the lower court should make sure there was "reasonably available" something better than freedom of choice before making a school district give it up for another plan that might not work as well. It was at this point that error was made by the lower courts for they construed *Green* to say that unless freedom of choice completely dismantled the dual system, they were bound to try something else even though the proof showed it would not work as well.

It surely must be a temptation for courts to lay down a broad rule that freedom of choice is not working generally and therefore should not be allowed anywhere at this time, regardless of circumstances and conditions and regardless of the fact that its replacement might be less effective. This Court in *Green* cautioned against this temptation:

> "There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in the light of the circumstances present and the options available in each instance."

When this appeal was filed in September, 1969 there were 441 white students remaining in the school system of

Tunica County. They constituted the last hope for integration for the Negro of Tunica County. These few white students had demonstrated a willingness to accept the Negro in an ever increasing number. They were accepting faculty desegregation. Wasn't this to be desired over a situation where the Negro has no school in the County to which he could turn for association with white children? These white children have now fled and the prompt restoration of freedom of choice offers the only possibility of their recapture.

It is generally accepted as true that the minority race carries the burden of desegregation. No doubt this is true in some instances and curiously, it is true in Tunica County, but we must be careful to acknowledge what is the minority race, for here, the burden is not upon the black race making up eighty-seven per cent of the student enrollment, but is upon the thirteen per cent white students, who in this County constitute the minority race.

If the races in Tunica County were mixed completely (assuming the School Board had the right to compel attendance, which they do not) we would and always will have schools identifiable by race because of the overwhelming number of Negroes in this school district.

With the Negro students constituting eighty-seven per cent of the total, with the Negro generally constituting eighty per cent of the population, with the Negro voter holding the majority at the polls, can it honestly be said that the Negro is so affected by history that he will be hesitant to elect a school attended by white children? Can we ostensibly to gain constitutional rights for the Negro any longer justify Court orders to change a system which the Negro has the political power to completely control? Indeed, in the face of the uncontradicted proof in this record, the positive finding of the District Court that zon-

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ing would result in all black schools, and the present miserable experience with zoning, if the most ardent black desegregationalists composed the entire school board, they would be compelled to adopt a freedom of choice plan as the only means of effecting any integration in Tunica County.

Much has been said about the demise of the doctrine of "all deliberate speed." But the death of this doctrine should not mean that one plan should be abandoned for another which is less effective, or not effective at all. It might be that freedom of choice is too slow and that something must be substituted that will accomplish the job faster. We have no quarrel with this if there is *in fact*, not abstract theory, something which will accomplish the job with greater speed. Here we have tried testing and it did not work. We have now experimented with zoning and it did not work. Now that these experiments have been conducted and failed it would seem sensible to return to something that had achieved a measure of success.

Some might say leave the situation as it is for a time and the white children will return to the county and to the school system. As the gap between the black and white student population increases, is it likely that white people will move back into this community? The ever increasing segregation in the cities of our nation points up the folly of the suggestion. Others might say that it is no defense that the whites will flee the system, but those that advance this argument forget that the black is deprived of all integration when all the whites leave and then we are faced with the difficult question of whose constitutional rights have been vindicated?

(b) Questions Involving Due Process

On December 29, 1969, the Clerk of the United States Court of Appeals for the Fifth Circuit notified the attorney for Tunica County School District that the brief of the District was to be filed "not later than January 15, 1970."

This letter recites that it was written at the direction of the Court. "Blind" copies were sent to the three judges assigned to the case, and therefore they also knew that the brief of the District was not due until January 15, 1970. (Supplemental Transcript of Record, page 1).

Perhaps overlooking its own instructions relative to the time for filing briefs, or perhaps changing its mind as to the need for any brief from the School District, or perhaps feeling that there was an urgency in the desegregation process in the Tunica County School District (unexplained) so that the Court could not wait the few more days to see the District's brief, the Court of Appeals decided this case on January 6, 1970, nine days before the brief of the School District was due.

A perusal of the unprinted record in this case, litigation spanning more than two and one-half years, shows that the Court could have benefited by a brief stating the pertinent facts and unique conditions and circumstances that compelled the District Judge to say that this was one of the most perplexing cases in Mississippi. Without such brief, the Appeals Court could not possibly have known and appreciated the vast differences between the Tunica County School District and the so many others it had considered, unusual differences that demanded that this School District receive independent treatment and consideration.

Curiously, the same panel of judges that took this irregular action in deciding the case before the brief was due,

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later, indirectly, indicated that they should not have done so.

The brief in question had been completed, but not printed when the Court ruled on January 6, 1970. It was hastily printed and filed with the Court with request that it be considered on petition for rehearing. (Supplemental Transcript of Record, page 2).

On February 9, 1970, long after the District Court had acted following remand by the Court of Appeals on January 6, 1970, the Court of Appeals, with two judges dissenting, denied rehearing. In denying rehearing, however, the majority of the Court made this rather strange statement in view of the fact that it acted previously without Appellant's brief:

> *"The matters asserted in the brief of the School District are appropriate for consideration by the District Court on remand."*

With deference to the panel of the Fifth Circuit, it is inescapable that if the material contained in the brief of the School District was worthy of consideration by the District Court, it required the consideration of the Court of Appeals before it acted on the appeal of the School District, and this statement by the panel is an admission of the mistake that had been made.

Imagine for a moment the consternation of the District Court:

(1) The Court of Appeals on January 6th orders immediate remand with no delay pending petition for rehearing and commands the District Court to immediately zone this rural county and completely abolish freedom of choice.

(2) Before the petition for rehearing is acted upon, the District Court faithfully executes this command of the

Fifth Circuit on January 23, creating zones in the School District and completely eliminating freedom of choice.

(3) After this is done, the Court of Appeals, acting as though it had not already remanded the case, finds that there is merit in the School District's brief and directs the District Court to give consideration to the matters discussed in the brief.

(4) The District Judge examines the brief of the School District and finds that it contains absolutely nothing for him to consider except the position (already considered by him before appeal) that freedom of choice was the only way integration could be brought about in Tunica County, Mississippi.

The only possible interpretation that can be placed on this language of the Court of Appeals is that in some way freedom of choice should be authorized in this unusual district that had a ratio of seven blacks to each white child, but at this particular time, it would open "Pandora's Box" throughout the South to make a clear cut ruling that freedom of choice was permissible under any circumstances even under the unusual conditions in Tunica County; nevertheless, the strong, though subtle, hint that this should be done in this unique district was passed back to the District Judge.

While the "ball" is passed between the District Court to the Fifth Circuit, back to the District Court, and now up to the United States Supreme Court, we have a school district, perhaps an entire community being cast upon the rocks, because no court has yet been found willing to acknowledge that the unusual circumstances that exist in Tunica County, Mississippi, justify the continued use of freedom of choice as the only method by which desegregation in this school district can be achieved.

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CONCLUSION

The error of the lower courts was their failure to heed the admonition of *Green* that "there is obviously no one plan that will do the job in every case." Instead, those courts have unsuccessfully attempted to place this District into the same mold designed for districts with entirely different circumstances when freedom of choice is the only workable method in this County.

We respectfully submit that this School District presents the strongest situation in America for freedom of choice, and, if it is not to be permitted under the circumstances in this case, litigants and lower courts should now be positively informed by the Supreme Court that at no time, at no place, and under no circumstances is freedom of choice to be allowed in this entire nation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for petitioners hereby certifies that true copies of the foregoing petition have been served upon the Solicitor General, Department of Justice, Washington, D. C. 20530, by depositing the same in a United States Post Office, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D. C. 20530.

Dated: ~~May~~ April 22, 1970.

Hardy Cobb

Counsel for Petitioners

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI DELTA DIVISION

UNITED STATES OF AMERICA, Plaintiff,

v.

TUNICA COUNTY SCHOOL DISTRICT, ET AL., Defendants.

Civil Action No. DC 6718

ORDER

It is ORDERED, ADJUDGED and DECREED that the defendants, their agents, officers, employees and successors and all those in active concert and participation with them, be and they are permanently enjoined from discriminating on the basis of race or color in the operation of the Tunica County school system. As set out more particularly in the body of the decree, they shall take affirmative action to disestablish all school segregation and to eliminate the effects of the dual school system:

I

SPEED OF DESEGREGATION

Commencing with the 1967-68 school year, in accordance with this decree, all grades, including kindergarten grades, if offered, shall be desegregated and pupils assigned to schools in these grades without regard to race or color.

II

EXERCISE OF CHOICE

The following provisions shall apply to all grades:

(a) *Who May Exercise Choice.* A choice of schools may be exercised by a parent or other adult person serv-

ing as the student's parent. A student may exercise his own choice if he (1) is exercising a choice for the ninth or a higher grade, or (2) has reached the age of fifteen at the time of the exercise of choice. Such a choice by a student is controlling unless a different choice is exercised for him by his parent or other adult person serving as his parent during the choice period or at such later time as the student exercises a choice. Each reference in this decree to a student's exercising a choice means the exercise of the choice, as appropriate, by a parent or such other adult, or by the student himself.

(b) *Annual Exercise of Choice.* All students, both white and Negro, shall be required to exercise a free choice of schools annually.

(c) *Choice Period.* The period for exercising choice shall commence March 1 and end March 31 preceding the school year for which the choice is to be exercised. No student or prospective student who exercises his choice within the choice period shall be given any preference because of the time within the period when such choice was exercised.

(d) *Mandatory Exercise of Choice.* A failure to exercise a choice within the choice period shall not preclude any student from exercising a choice at any time before he commences school for the year with respect to which the choice applies, but such choice may be subordinated to the choices of students who exercised choice before the expiration of the choice period. All students must exercise a choice as a condition precedent to registration and attendance at any school.

(e) *Public Notice.* On or within a week before the date the choice period opens, the defendants shall arrange for the conspicuous publication of a notice describing the

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provisions of this decree in the newspaper most generally circulated in the community. The text of the notice shall be substantially similar to the text of the explanatory letter sent home to parents. Publication as a legal notice will not be sufficient. Copies of this notice must also be given at that time to all radio and television stations located in the community. Copies of this decree shall be posted in each school in the school system and at the office of the Superintendent of Education.

(f) *Distribution of Explanatory Letters and Choice Forms.* On the first day of the choice period, there shall be distributed by the teachers to each child an explanatory letter and a choice form for delivery to his parent, together with an envelope addressed to the Superintendent. Personal notice will be given to the parent by delivery to the pupil with adequate procedures to insure the delivery of the notice. The text for the explanatory letter and choice form shall essentially conform to the sample letter and choice form appended to this decree.

(g) *Extra Copies of the Explanatory Letter and Choice Form.* Extra copies of the explanatory letter and choice form shall be freely available to parents, students, prospective students, and the general public at each school in the system and at the office of the Superintendent of Education during the times of the year when such schools are usually open.

(h) *Content of Choice Form.* Each choice form shall set forth the name and location and the grades offered at each school and may require of the person exercising the choice the name, address, age of student, school and grade currently or most recently attended by the student, the school chosen, the signature of *one* parent or other adult person serving as parent, or where appropriate the signature of the student, and the identity of the person signing.

No statement of reasons for a particular choice, or any other information, or any witness or other authentication, may be required or requested, without the approval of the court.

(i) *Return of Choice Form.* At the option of the person completing the choice form, the choice may be returned by mail, in person, or by messenger to any school in the school system or to the office of the Superintendent.

(j) *Choices not on Official Form.* The exercise of choice may also be made by the submission in like manner of any other writing which contains information sufficient to identify the student and indicates that he has made a choice of school.

(k) *Choice Forms Binding.* When a choice form has once been submitted and the choice period has expired, the choice is binding for the entire school year and may not be changed except in cases of parents making different choices from their children under the conditions set forth in paragraph II (a) of this decree and in exceptional cases where, absent the consideration of race, a change is educationally called for or where compelling hardship is shown by the student. A change in family residence from one neighborhood to another shall be considered an exceptional case for purposes of this paragraph.

(l) *Preference in Assignment.* In assigning students to schools, no preferences shall be given to any student for prior attendance at a school and, except with the approval of court in extraordinary circumstances, no choice shall be denied for any reason other than overcrowding. In case of overcrowding at any school, preference shall be given on the basis of the proximity of the school to the homes of the students choosing it, without regard to race or color. Standards for determining overcrowding shall be applied uniformly throughout the system.

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(m) *Second Choice where First Choice is Denied.* Any student whose choice is denied must be promptly notified in writing and given his choice of any school in the school system serving his grade level where space is available. The student shall have seven days from the receipt of notice of a denial of first choice in which to exercise a second choice.

(n) *Transportation.* The defendants shall provide transportation on a racially nondiscriminatory basis, to students on the basis of the school chosen by the individual student. Every student choosing either the formerly white or the formerly Negro school nearest his residence must be transported to the school which he chooses, whether or not it is his first choice, if that school is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules.

(o) *Officials not to Influence Choice.* At no time shall any official, teacher, or employee of the school system influence any parent, or other adult person serving as a parent, or any student, in the exercise of a choice or favor or penalize any person because of a choice made. If the defendant school board employs professional guidance counselors, such persons shall base their guidance and counselling on the individual student's particular personal, academic, and vocational needs. Such guidance and counselling by teachers as well as professional guidance counselors shall be available to all students without regard to race or color.

(p) *Protection of persons Exercising Choice.* Within their authority school officials are responsible for the protection of persons exercising rights under or otherwise affected by this decree. They shall, without delay, take appropriate action with regard to any student or staff mem-

ber who interferes with the successful operation of the plan. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior. The school board shall not publish, allow, or cause to be published, the names or addresses of pupils exercising rights or otherwise affected by this decree. If officials of the school system are not able to provide sufficient protection, they shall seek whatever assistance is necessary from other appropriate officials.

III

PROSPECTIVE STUDENTS

Each prospective new student shall be required to exercise a choice of schools before or at the time of enrollment. All such students known to defendants shall be furnished a copy of the prescribed letter to parents, and choice form, by mail or in person, on the date the choice period opens or as soon thereafter as the school system learns that he plans to enroll. Where there is no preregistration procedure for newly entering students, copies of the choice forms shall be available at the Office of the Superintendent and at each school during the time the school is usually open.

IV

TRANSFERS

(a) *Transfers for Students.* Any student shall have the right at the beginning of a new term, to transfer to any school from which he was excluded or would otherwise be excluded on account of his race or color.

(b) *Transfers for Special Needs.* Any student who requires a course of study not offered at the school to which he has been assigned may be permitted, upon his written application, at the beginning of any school term or semes-

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ter, to transfer to another school which offers courses for his special needs.

(c) *Transfers to Special Classes or Schools.* If the defendants operate and maintain special classes or schools for physically handicapped, mentally retarded, or gifted children, the defendants may assign children to such schools or classes on a basis related to the function of the special class or school that is other than freedom of choice. In no event shall such assignments be made on the basis of race or color or in a manner which tends to perpetuate a dual school system based on race or color.

V

SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

No student shall be segregated or discriminated against on account of race or color in any service, facility, activity, or program (including transportation, athletics, or other extracurricular activity) that may be conducted or sponsored by the school in which he is enrolled. A student attending school for the first time on a desegregated basis may not be subject to any disqualifications or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer or newly assigned student except that such transferees shall be subject to long-standing, non-racially based rules of city, county, or state athletic associations dealing with the eligibility of transfer students for athletic contests. All school use or school-sponsored use of athletic fields, meeting rooms, and all other school related services, facilities, activities, and programs such as commencement exercises and parent-teacher meetings which are open to persons other than enrolled students shall be open

to all persons without regard to race or color. All special educational programs conducted by the defendants shall be conducted without regard to race or color.

VI

SCHOOL EQUALIZATION

(a) *Inferior Schools.* In schools heretofore maintained for Negro students, the defendants shall take prompt steps necessary to provide physical facilities, equipment, courses of instruction, and instructional materials of quality equal to that provided in schools previously maintained for white students. Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios shall, to the extent feasible, be distributed evenly between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, where such improvement would otherwise be required by this paragraph, such school shall be closed as soon as possible, and students enrolled in the school shall be reassigned on the basis of freedom of choice. By October of each year, defendants shall report to the Clerk of the Court, pupil-teacher ratios, pupil-classroom ratios, per-pupil expenditures both as to operating and capital improvement costs, and shall outline the steps to be taken and the time within which they shall accomplish the equalization of such schools.

(b) *Remedial Programs.* The defendants shall provide remedial education programs which permit students attending or who have previously attended segregated schools to overcome past inadequacies in their education.

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VII

NEW CONSTRUCTION

The defendants, to the extent consistent with the proper operation of the school system as a whole, shall locate any new school and substantially expand any existing schools with the objective of eradicating the vestiges of the dual system.

VIII

FACULTY AND STAFF

(a) *Faculty Employment.* Race or color shall not be a factor in the hiring, allocation, reallocation, promotion, demotion, or dismissal of teachers and other professional staff members, including student teachers, except that race may be taken into account for the purpose of counteracting or correcting the effect of the segregated assignment of faculty and staff in the dual system. Teachers, principals, and staff members shall be employed at individual schools so that the faculty and staff is not composed exclusively of members of one race. Defendants shall take positive and affirmative steps to accomplish the desegregation of their school faculties and to achieve substantial desegregation of faculties in as many of the schools as possible during the remainder of the 1967-68 school year and to achieve this purpose, *inter alia*, defendants shall not approve contracts for vacancies occurring after the entry of this order and for employment in the 1968-69 school year unless the approval of those contracts will accomplish substantial faculty desegregation. The tenure of teachers in the system shall not be used as an excuse for failure to comply with this provision. The defendants shall establish as an objective that the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school.

(b) *Dismissals.* Teachers and other professional staff members may not be discriminatorily allocated, dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system shall be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system shall be evaluated in selecting the staff members to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the Clerk of the Court, serving copies upon opposing counsel, within five (5) days after such dismissal, demotion, etc., as proposed.

(c) *Past Assignments.* The defendants shall take steps to employ and contract with teachers and other professional staff members to eliminate the effects of the dual school system.

(d) The defendants Superintendent and members of the board of education, of the school district, shall not approve future principals' recommendations of faculty and staff members or enter into contracts for the 1968-69 school year and subsequent school years with principals, teachers, and staff members, unless the results of such approvals and contracts accomplish the purposes of Paragraph VIII.

(e) For the school year 1967-68, and thereafter no contract of employment with a principal, teacher, or other staff member shall be for a term longer than one (1) school year.

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IX

REPORTS TO THE COURT

(1) *Report on Choice Period.* The defendant shall serve upon the opposing parties and file with the Clerk of the Court not later than 15 days after the entry of this order, or if this order directs the holding of another choice period for the 1967-68 school year, not later than 15 days after the end of such choice period, and in each subsequent year on or before June 1, a report tabulating by race the number of choice applications and transfer applications received for enrollment in each grade in each school in the system, and the number of choices and transfers granted and the number of denials in each grade of each school. The report shall also state any reasons relied upon in denying choice and shall tabulate, by school and by race of student, the number of choice and transfers denied for each such reason.

In addition, the report shall show the percentage of pupils actually transferred or assigned from segregated grades or to schools attended predominantly by pupils of a race other than the race of the applicant, for attendance during the 1966-67 school year, with comparable data for the 1965-66 school year. Such additional information shall be included in the report served upon opposing counsel and filed with the Clerk of the Court.

(2) *Report After School Opening.* The defendants shall, in addition to reports elsewhere described, serve upon opposing counsel and file with the Clerk of the Court within 15 days after the opening of schools for the fall semester of each year, a report setting forth the following information:

(i) The name, address, grade, school of choice and school of present attendance of each student who

has withdrawn or requested withdrawal of his choice of school or who has transferred after the start of the school year, together with a description of any action taken by the defendants on his request and the reasons therefor.

(ii) The number of faculty vacancies, by school, that have occurred or been filled by the defendants since the order of this Court or the latest report submitted pursuant to this sub-paragraph. This report shall state the race of the teacher employed to fill each such vacancy and indicate whether such teacher is newly employed or was transferred from within the system. The tabulation of the number of transfers within the system shall indicate the schools from which and to which the transfers were made. The report shall also set forth the number of faculty members of each race assigned to each school for the current year.

(iii) The number of students by race, in each grade of each school.

The defendants shall also file a report by July 1 of each year setting forth the information contained in sub-paragraph (ii) above.

EXPLANATORY LETTER

(School System Name and Office Address)

(Date Sent)

Dear Parent:

All grades in our school system will be desegregated next year. Any student who will be entering one of these grades next year may choose to attend any school in our system, regardless of whether that school was formerly all-white or all-Negro. It does not matter which school your child is attending this year. You and your child may select any school you wish.

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Every student, white and Negro, must make a choice of schools. If a child is entering the ninth or higher grade, or if the child is fifteen years old or older, he may make the choice himself. Otherwise, a parent or other adult serving as parent must sign the choice form. A child enrolling in the school system for the first time must make a choice of schools before or at the time of his enrollment.

The form on which the choice should be made is attached to this letter. It should be completed and returned by March 31. You may mail it in the enclosed envelope, or deliver it by messenger or by hand to any school principal or the Office of the Superintendent at any time between this date and March 31. No one may require you to return your choice form before March 31 and no preference is given for returning the choice form early.

No principal, teacher or other school official is permitted to influence anyone in making a choice or to require early return of the choice form. No one is permitted to favor or penalize any student or other person because of a choice made. A choice once made cannot be changed except for serious hardship.

No child will be denied his choice unless for reasons of overcrowding at the school chosen, in which case children living nearest the school will have preference.

Transportation will be provided, if reasonably possible, no matter what school is chosen.

Your School Board and the school staff will do everything we can to see to it that the rights of all students are protected and that desegregation of our schools will be carried out successfully.

Sincerely yours,

Superintendent

A14

CHOICE FORM

This form is provided for you to choose a school for your child to attend next year. You have until March 31, to make your choice. It does not matter which school your child attended last year, and does not matter whether the school you choose was formerly a white or Negro school. This form must be mailed or brought to the principal of any school in the system or to the office of the Superintendent, by March 31. A choice is required for each child.

Name of child .....
(Last) (First) (Middle)

Address .....

Name of parent or other

adult serving as parent .....

If child is entering first grade, date of birth:

.....
(Month) (Day) (Year)

Grade child is entering .....

School Attended last year .....

Choose one of the following schools by marking an X beside the name.

Name of School	Grade	Location
( )	.....	
( )	.....	
( )	.....	

Signature .....

Date .....

.....

.....

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To be filled in by Superintendent:

School Assigned .....[1]

It is further ORDERED, ADJUDGED and DECREED:

1) That jurisdiction of this cause shall be, and the same hereby is, retained for all purposes, and especially for the purpose of entering any and all further orders which may become necessary for the purpose of enforcing or modifying this order, either or both.

2) That the clerk of this court shall be, and he hereby is, directed to mail certified copies of this order by certified mail to all counsel of record, and to note such mailings on the docket.

This the 19th day of January, 1968.

/s/ Claude F. Clayton
Claude F. Clayton
United States Circuit Judge
Sitting by Special Designation as District Judge

1. In subsequent years the dates in both the explanatory letter and the choice form should be changed to conform to the choice period.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI DELTA DIVISION

UNITED STATES OF AMERICA, Plaintiff

v.

TUNICA COUNTY SCHOOL DISTRICT, ET AL., Defendants

No. DC 6718-K

ORDER

Upon consideration of the motion filed by the plaintiff in this cause and the evidence adduced at the hearing, and the court having made findings of fact and conclusions of law this date filed in the case; it is

ORDERED

(1) That the district shall, not later than June 18, 1969, submit to this court a new and workable plan for desegregating the schools of Tunica County that will result in a racially nondiscriminatory school system. Said plan shall be effective for the commencement of the school year 1969-70, and shall embody concrete and specific proposals for:

(a) The assignment, and transfer, of pupils to schools irrespective of race;

(b) Employment and assignment of administrative personnel, faculty and staff to such schools, irrespective of race; and

(c) A unitary system for transporting children attending the public schools.

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Among other things, the plan of desegregation to be submitted must insure:

1. No schools wholly attended by Negro students.

2. No schools having a small fraction of Negroes enrolled in predominantly white schools.

3. No schools without substantial integration of faculty, staff and activities (including athletics); and said plan, with respect to faculty desegregation, shall provide for the school year 1969-70 for employment and assignment at each school of not less than one out of every six classroom teachers being of a different race, and the employment and assignment for the year 1970-71 of full faculty and staff desegregation according to race of students.

Concurrently with the filing of said plan, defendants are directed to serve two copies thereof upon attorneys for plaintiff.

Plaintiff shall have an opportunity to make objections, if any, to said new plan by filing such objections in writing not later than June 27, 1969.

(2) The court will take up and consider the new plan of desegregation and objections thereto on Thursday, July 3, 1969, at 9 o'clock a.m., in the United States Courthouse in Greenville, Mississippi.

(3) The execution of freedom of choice and choice period requirements as heretofore provided by former decree of this court is suspended until further order.

Jurisdiction of this cause is retained for all purposes.

This, 14th day of May, 1969.

/s/ William C. Keady
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI DELTA DIVISION

UNITED STATES OF AMERICA, Plaintiff v. TUNICA COUNTY SCHOOL DISTRICT, ET AL., Defendants	No. DC 6718-K

ORDER

In accordance with findings of fact delivered from the bench at hearings conducted on July 3, 1969, and July 17, 1969, and conclusions of law more fully set forth by this court in *United States of America* v. *Sunflower County School District,* No. GC 6637-K, by opinion released June 24, 1969; it is

ORDERED

That the defendants, their agents, officers, employees, successors and all those in active concert and participation with them, be and they are hereby permanently enjoined from discriminating on the basis of race or color in the operation of the school system of Tunica County School District. As hereinafter set out, they shall take affirmative action to disestablish all school segregation and to eliminate the effects of the dual school system.

I.

STUDENT DESEGREGATION

(1) *For the school year 1969-70,* the school children of the district shall be assigned to attendance centers as follows:

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(a) Grades 1 through 4 shall be assigned to attendance centers on the basis of standardized tests given to the students of such grades prior to the beginning of the 1969-70 school year by an outside disinterested testing agency. Students entering the first grade shall be uniformly given the Metropolitan Readiness Test or similar readiness test, and students entering the second, third and fourth grades shall be uniformly given the SRA Achievement Series or a comparable recognized achievement test. All tests shall be scored by a disinterested agency and the results made known to the school district prior to the commencement of said school year. Students who score at or above one grade level on national norms or within one standard deviation shall be assigned to the Tunica Elementary School, and the remaining students in said grades shall be assigned to the Rosa Fort School or the Dundee School, whichever is closer to the student's residence. Each student shall be required to attend the attendance center nearest his residence to which his score assigns him; provided, however, that in case of overcrowding, school officials of the district may assign children to attend another school. During the month of April or May of each school year hereafter beginning with April or May 1970, the same or similar tests shall be given to each student desiring to enroll in any one of the said four grades during the next ensuing school year, and said tests shall be scored and students assigned to schools as hereinabove provided.

(b) Students enrolled in grades 5 through 10 shall be assigned to district schools in accordance with freedom of choice of the individual student. Students in grades 11 and 12 shall also be assigned in accordance with freedom of choice, provided, however, that the school district shall first satisfy the positive desegregation requirements of these two grades as next provided in (c).

(c) For the school year 1969-70 only, 20% of the enrollment in grades 11 and 12 of the formerly all-white high school located at Tunica shall be Negro students assigned by the school district on the basis of proximity of residence, freedom of choice or other method as it may select.

(2) *For the school year 1970-71*, the school children of the district shall be assigned to attendance centers as follows:

(a) Grades 1 through 4 shall be assigned in accordance with (1) (a) above.

(b) Grades 5, 6, 7 and 8 shall be assigned to attendance centers on the basis of test scores on a uniformly standardized achievement test as provided in (1) (a) above, except that said tests shall be administered in April or May of each school year beginning with April or May 1970, and also except that those students in grades 7 and 8 who score at or above one grade level on national norms or within one standard deviation shall be assigned to the Tunica County High School, and the remaining students in said grades shall be assigned to the Rosa Fort School or the Dundee School.

(c) Students enrolled in grades 9 to 12 shall be assigned to attendance centers according to student's freedom of choice, provided, however, that the school district shall first satisfy positive desegregation requirements of these grades as next provided in (d).

(d) For the school year 1970-71 only, 20% of the enrollment in grades 9 to 12 of the formerly all-white high school located at Tunica shall be Negro students assigned by the school district on the basis of proximity of residence, freedom of choice or other method as it may select.

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(3) *For the school year 1971-72 and thereafter,* the school children of the district shall be assigned to attendance centers as follows:

(a) Grades 1 through 8 shall be assigned in accordance with (1) (a) and (2) (b) above.

(b) Grades 9 through 12 shall be assigned to attendance centers uniformly on a nationally recognized standard achievement test, with students who score at or above one grade level on national norms or within one standard deviation assigned to Tunica County High School, and the remaining students in said grades assigned to Rosa Fort School.

(4) Notwithstanding the foregoing paragraphs (1) (a), (2) (b) and (3) (b), in event the number of students composing the higher scoring group shall, at the commencement of any school year, fail to utilize the maximum recommended capacity of available classroom space, the district shall assign to that school such greater percentage, or number of next highest scoring students, as may be needed to fully utilize said capacity.

(5) New students entering any grade of the district's schools shall be given the tests for that grade and assigned to schools according to their scores.

(6) Request for transfer by a student to attend school in another attendance center of the district will be subject to review by defendants and may be granted, but only if the granting thereof will either 1) relieve a crowded school condition; 2) assist a physically handicapped child; or 3) promote desegregation. Moreover, defendants shall, on request, permit any student to transfer from a school where students of his race are a majority to any other school within the system where students of his race are a minority, and they may assign students on such basis; provided,

however, that such request for transfer may be denied in the event the transfer would be to an already overcrowded grade or center.

II.

FACULTY AND STAFF DESEGREGATION

Within the full extent of the district's ability so to do, including the availability of qualified personnel, not less than one of every six classroom teachers of a different race shall be employed and assigned to each of the schools or attendance centers for the 1969-70 school year; and for the 1970-71 school year and thereafter there shall be full faculty and staff desegregation, to such an extent that the faculty at each school is not identifiable to the race of the majority of the students at any such school.

III.

TRANSPORTATION

The district shall provide a unitary plan for the transportation of school children based upon territorial zones or other natural grouping of pupil residence, irrespective of race, and seeking to eliminate insofar as practicable overlapping or duplicating routes. All children of whatever race shall be treated substantially alike as to seating capacity, bus schedules, length of route, riding time, etc., depending upon the physical factors governing each particular bus route.

IV.

SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

No student shall be segregated or discriminated against on account of race or color in any grade, service, facility, activity, or program (including transportation, athletics,

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or other extracurricular activity) that may be conducted or sponsored by the school in which the student is enrolled.

V.

NEW CONSTRUCTION

The defendants, to the extent consistent with the proper operation of the school system as a whole, shall locate any new school and substantially expand any existing schools with the objective of eradicating the vestiges of the dual school system.

VI.

PROTECTION OF PERSONS EXERCISING RIGHTS UNDER THIS DECREE

Within their authority, school officials are responsible for the protection of persons exercising rights under, or otherwise affected by, this order. They shall, without delay, take appropriate action with regard to any student, teacher or staff member who interferes with the successful operation of the provisions of this order. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior. If officials of the school system are not able to provide sufficient protection, they shall seek whatever assistance is necessary from other appropriate officials. Moreover, school officials may apply to this court for protective orders against any person or persons interfering with the execution of the terms of this order.

VII.

REPORTS TO THE COURT

(a) On or before October 15, 1969, and annually thereafter, unless otherwise ordered by the court, the defendants shall submit the following reports to the court:

1. The name, race and teaching station of each member of the faculty and staff of each attendance center of the district; and

2. The number of children, by race, in attendance in each attendance center of the district, by grades. Said report shall disclose the range of test scores for the children of each grade assigned to different buildings, and indicating by number and by race the children so assigned by test scores.

(b) On or before October 15, 1969, and quarterly thereafter until otherwise ordered by the court, the defendants shall submit the following reports to the court:

1. The name, race and age of each student who has been granted a transfer on account of crowded school situation or to aid a physically handicapped child, giving the name of the school from which the student transferred, the school to which the transfer was made, and the grade involved.

2. The name, race and age of each student granted a transfer in order to promote desegregation, the grade involved, the name of the school from which the transfer was granted, and the school to which the transfer was made.

(c) That defendants when filing reports pursuant to the provisions of this order shall serve duplicate copies upon opposing counsel.

It is further ORDERED

(1) Jurisdiction of this cause shall be, and the same hereby is, retained for all purposes, and especially for the purpose of entering any and all further orders which may become necessary for the purpose of enforcing or modifying this order, either or both.

(2) The Clerk of this court shall be, and he hereby is, directed to mail certified copies of this order by certified

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mail to all counsel of record and to note such mailings on the docket.

This, 22nd day of July, 1969.

/s/ William C. Keady
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI DELTA DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

TUNICA COUNTY SCHOOL DISTRICT, ET AL.,
Defendants.

No. DC 6718-K

ORDER

The motion of defendants for supplemental relief and for modification of desegregation order of this court dated July 22, 1969, having been presented, and all parties appearing in court personally and by their attorneys, having announced their readiness for trial, and after introduction of evidence, arguments of counsel, and the court having made oral findings delivered from the bench as contained in the court reporter's notes; it is

ORDERED

That the motion of defendants for supplemental relief and modification of prior desegregation order of this court dated July 22, 1969, be, and the same is hereby denied, except as follows:

(1) ¶I headed Student Desegregation (1) (c) dealing with enrollment for the school year 1969-70 only of

Negro students in grades 11 and 12 of the formerly all-white high school located at Tunica, is modified to provide that the obligation of the district to satisfy the 20% requirement shall be fulfilled by making requests of Negro students but that no such student shall be, against his will, required to attend said high school.

(2) For the purpose of implementing the testing plan for grades 1 through 4 as provided in ¶I (1) (a), defendants are authorized and directed to establish a deadline for the taking of such tests by every child entering such grades, as a condition precedent to his right to attend public school for this semester; and defendants shall have the right to bar admission to any child failing to take such tests within the time prescribed by defendants, but not beyond the date of October 15, 1969. To effectuate this direction, defendants shall promptly cause to be notified all students and their parents of the necessity for taking the test at a time fixed by defendants, but not later than October 15, 1969, and of notifying such persons of the consequences for failing to take the tests. Any supplemental tests given after this date for the current semester may be administered by defendants' own personnel and reports of said supplemental tests shall be filed with the court on or before December 15, 1969, showing the information required to be submitted in the original reports to be filed on or before October 15, 1969, in accordance with ¶VII (a) of the aforesaid order.

In all other respects, defendants are ordered to comply with the terms and provisions of the order of this court dated July 22, 1969.

This, 12th day of September, 1969.

/s/ William C. Keady
Chief Judge
United States District Court

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969.

No. 28912

D. C. Docket No. CA No. DC 6718-K
UNITED STATES OF AMERICA,
Appellant,

versus

TUNICA COUNTY SCHOOL DISTRICT,
Appellee.

Appeal from the United States District Court for the Northern District of Mississippi.

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was taken under submission by the Court upon the record on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and the same is hereby reversed; and that this cause be, and the same is

hereby remanded with directions to the said District Court in accordance with the opinion of this Court.

It is further ordered that appellee, school board, pay the costs on appeal in this Court.

January 6, 1970

Issued as Mandate: January 6, 1970.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI DELTA DIVISION

UNITED STATES OF AMERICA, Plaintiff v. TUNICA COUNTY SCHOOL DISTRICT, ET AL., Defendants	No. DC 6718-K

ORDER

In obedience to the mandate of the United States Fifth Circuit Court of Appeals reversing the prior order of this court approving public school desegregation plan and directing the court to require Tunica County School District to take steps for the preparation and implementation of a new plan of public school desegregation, the court, of its own motion, does hereby ORDER as follows:

(1) That defendants are hereby directed to prepare, submit, and file with the clerk of this court, not later than January 15, 1970, a new plan for the operation of its schools which will eliminate the dual system based on race or color, and permit defendants to begin operating a unitary system of schools within which no person shall be excluded from any school because of race or color.

(2) Said plan with respect to student desegregation shall be based upon pairing, zoning, or a combination thereof. Said plan with respect to desegregation of faculty and staff, transportation, services, athletics and other extracurricula activities shall comply with the terms, provisions and conditions (including time specified) in *Singleton* v. *Jackson Municipal Separate School District* (and consolidated cases en banc) (No. 26,285 December 1, 1969) (Parts I and III), except as those times are herein expressly modified.

(3) The School Board is directed to take such preliminary steps as may be necessary to prepare for complete student desegregation by February 1, 1970, in accordance with the order of the Supreme Court in *Carter* v. *West Feliciana Parish School Board*, 1969, ____U.S. ____, ____ S. Ct. ____ (No. 944 October Term), in the event the Supreme Court requires student desegregation by February 1, 1970.

This, 7th day of January, 1970.

/s/ William C. Keady
Chief Judge
United States District Court

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28912

UNITED STATES OF AMERICA,
Appellant,

versus

TUNICA COUNTY SCHOOL DISTRICT,
Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

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(January 6, 1970)

Before BELL, AINSWORTH, and GODBOLD, Circuit Judges.

PER CURIAM: Both the School Board and the United States have appealed from the judgment entered by the District Court in this school desegregation case. The United States has now moved to summarily reverse the judgment. We grant the motion with direction.

This school district operates two traditionally white schools (grades 1-6 and 7-12) and two all-Negro schools (grades 1-8 and 1-12), serving 555 white and 3,155 Negro students. In response to the government's motion for supplemental relief based on *Green* v. *County School Board*, 391 U.S. 430 (1968), the district court held freedom of choice to be unacceptable, requiring submission of a new

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plan. The school board resubmitted its *Jefferson*-model free choice plan, and, in the alternative, a plan by which students would be assigned to schools on the basis of achievement-test scores. The plan seems identical in all essential respects to the plan before this court in *Anthony v. Marshall County Board of Education*, No. 28261, decided sub nom. *Singleton* v. *Jackson Municipal Separate School District*, 5 Cir., 1969, ... F.2d ..... (No. 26285, slip opinion dated December 1, 1969) (en banc), petition for certiorari pending. Students in four grades per year would be tested, with the highest-scoring students assigned to the white schools and all others to the Negro schools.

The principal issue raised by the school board in its statement of errors is whether the district court erred in not approving continued use of free choice. The issues raised by the government, in its motion, is whether the district court erred in approving a three-step plan which bases the assignment of students to schools on achievement-test scores.

Inasmuch as the facts and issues are nearly identical to those in the Marshall County case, the judgment of the district court must be reversed and the case remanded for further proceedings in conformity with *Singleton*, supra, and the Marshall County portion thereof:

The District Court is directed to comply with all of the terms, provisions and conditions in *Singleton*, supra, Parts I and III, except for the following:

(1) The District Court shall order the Board to submit a desegregation plan to provide a unitary school system and said plan shall be filed with the District Court not later than January 15, 1970.

(2) The District Court shall order the School Board to take such preliminary steps as may be necessary to prepare for complete student desegregation by

February 1, 1970, in accordance with the order of the Supreme Court in *Carter* v. *West Feliciana Parish School Board*, 1969, ... U.S. ....., ... S.Ct. ..... [No. 944 October Term], in the event the Supreme Court requires student desegregation by February 1, 1970.

The mandate in this cause shall issue forthwith. No stay will be granted pending petition for rehearing, or application for certiorari.

REVERSED AND REMANDED WITH DIRECTIONS.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28912

UNITED STATES OF AMERICA,
Appellant,

versus

TUNICA COUNTY SCHOOL DISTRICT,
Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

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ON PETITION FOR REHEARING AND PETITION FOR PETITION FOR REHEARING EN BANC

(February 9, 1970)

Before BELL, AINSWORTH, and GODBOLD, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED. The matters asserted

in the brief of the School District are appropriate for consideration by the district court on remand.

Judges Coleman and Clark dissent for the reasons stated in their dissenting opinions filed in *Singleton v. Jackson Municipal Separate School District*, No. 26,285, et al., 5 Cir. 1970, ... F.2d ..... (slip opinion dated January 21, 1970).

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1498

THE TUNICA COUNTY SCHOOL DISTRICT
ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The pertinent opinions and orders below, none of which are reported, are set forth in the Appendix to the petition.

JURISDICTION

The judgment of the court of appeals (Pet. App. A27–A28) was entered on January 6, 1970. Timely petitions for rehearing and for rehearing *en banc* were denied on February 9, 1970 (Pet. App. A33–A34). The petition for a writ of certiorari was filed

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on April 28, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly disapproved the continued use of freedom of choice as petitioners' method of pupil assignment.

STATEMENT

This action was commenced in the summer of 1967 by the United States, which, pursuant to Title IV of the Civil Rights Act of 1964 (42 U.S.C. 2000c *et seq.*), sought an order requiring the desegregation of the Tunica County School District—a county-wide school system which serves an area with a population of approximately 17,000, of whom about 80 percent are Negro. There are at present about 3,000 Negroes and no whites attending the district's schools (Pet. 7–8).

On December 18, 1968, the United States moved for supplemental relief based upon this Court's decision in *Green* v. *County School Board,* 391 U.S. 430. The district court held freedom of choice unacceptable, and required submission of a new plan (Pet. App. A16–A17). Thereafter the district court ordered the adoption of an assignment plan based upon student scores on standard achievement tests (Pet. App. A18–A25). Implementation of this plan was to commence with the beginning of the 1969–70 school year. In September 1969, however, petitioners moved to postpone implementation of the plan and

for the continuation of freedom of choice. This motion was denied (Pet. App. A25–A26) and petitioners appealed. The court of appeals denied the relief and, on the authority of *Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1211 (C.A. 5), also required that the test score method of student assignment be replaced by a plan which promised achievement of a unitary system (Pet. App. A30–A32). The district court then ordered the immediate submission of a desegregation plan "based upon pairing, zoning, or a combination thereof" (Pet. App. A29), and the court of appeals thereafter denied rehearing (Pet. App. A33–A34).

ARGUMENT

1. The court of appeals correctly disallowed the continued use of freedom of choice as petitioners' method of student assignment. This Court held in *Green, supra,* that the burden is on those who wish to use such a system to demonstrate that their " * * * proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation." 391 U.S. at 439. In the *Green, Raney* and *Monroe* cases,[1] this Court ruled that freedom of choice was unacceptable because, after it had been in operation for three years, not more than 15 to 20 percent of the Negro children were attending tradi-

[1] *Raney* v. *Board of Education*, 391 U.S. 443; *Monroe* v. *Board of Commissioners*, 391 U.S. 450.

tionally white schools and student enrollment in the traditionally Negro schools remained all-Negro. In Tunica County, freedom of choice never resulted in more than three percent desegregation[2] and, as in *Green* and its two companion cases, the traditionally Negro schools have remained all-Negro (Pet. 7–8). On this record, therefore, *Green* is controlling, and the courts below correctly required petitioners to submit a plan to unitize the district's public schools.

2. The fact that all white students in Tunica County have left the public schools does not justify the re-establishment of freedom of choice. Petitioners admit that, because there is an absence of residential segregation, either zoning or pairing would result in complete desegregation if the whites would attend (Pet. 9). But petitioners argue that "white flight" has frustrated all attempts to desegregate and that the only way to recapture the white students is by permitting them to choose the school they will attend.

It is, of course, lamentable that the white parents of Tunica County have chosen to deprive their children of a public school education. If this hostility to school desegregation were, however, to be considered in defining petitioners' obligations, then these white parents would become the ultimate arbiters of the Constitution. That is precisely what this Court re-

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[2] Petitioners state that during the 1968–69 school year, Negroes constituted 15 percent of the total enrollment of the former white school. Thus, only approximately 98, or 3 percent, of the 3,000 Negroes in the district were desegregated (Pet. 7).

jected in *Monroe* v. *Board of Commissioners* (391 U.S. at 459):

> We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. "But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown II*, at 300.

See, also, *Cooper* v. *Aaron*, 358 U.S. 1, 16; *United States* v. *Indianola Municipal Separate School District*, 410 F. 2d 626, 631 (C.A. 5).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JERRIS LEONARD,
Assistant Attorney General.

MAY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970